be submitted to the jury,[11] or impliedly makes such request by accompanying the motion with a request for instruction,[12] or by other conduct which negatives the idea of waiver.[13] In view of the fact that the rule may be avoided in every case, it would seem that it is without utility in the trial of cases while it may result in depriving a litigant of his constitutional right to a jury trial because of the incompetence or ignorance of counsel.

EXERCISE OF THE POWER OF EQUITY TO ENJOIN PROCEEDINGS IN ANOTHER STATE.*—It is well settled that the courts of one state have the power, in a proper case, to restrain a citizen of that state from prosecuting a suit against another citizen in the courts of a sister state.[1] The opinions say that the decree operates *in personam* and is in nowise an interference with the proceedings of the court in the sister state.[2] The question, what constitutes a proper case for the exercise of such power, however, has never been adequately answered, and the result is a confusion of conflicting decisions.

In the absence of equitable considerations the general rule is that where suit may be brought in either of two tribunals, that court which first obtains jurisdiction of the case retains it; and this extends, upon principles of comity, to cases of conflicting suits brought in the courts of sister states.[3] The power of injunction, therefore, should not be exercised capriciously, nor merely to compel litigants to use the courts of their own state, nor even because the petitioner has good reason to apprehend a less favorable result for himself in the foreign court.[4]

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[11] See cases *supra*, footnote 5.

[12] *Cf. Empire State Cattle Co.* v. *Atchison, etc. Ry.* (1907) 210 U. S. 1, 28 Sup. Ct. 607.

[13] *Eastern D. P. Dye Works* v. *Travelers Ins. Co., supra*, footnote 5. Although it is said that mutual motions amount to a waiver of a jury trial, it has been held that it is not error to submit a case to the jury notwithstanding the fact that such motions were unaccompanied by an express or implied negation of the waiver. *Lake Superior Iron Co.* v. *Drexel* (1882) 90 N. Y. 87. The assumption of no dispute of facts or of a waiver, therefore, seems unsound.

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* The scope of this note is limited to the case where both parties are residents of the state in which an injunction is sought. Where one or both of the parties are not so resident, questions of power and not merely those of exercise, are involved.

[1] *Culp* v. *Butler* (Ind. 1919) 122 N. E. 684; *Wabash Ry.* v. *Peterson* (Iowa 1919) 175 N. W. 523; *Reed's Adm'x* v. *Illinois Cent. R. R.* (1918) 182 Ky. 455, 206 S. W. 794; *Standard Roller Bearing Co.* v. *Crucible Steel Co.* (1906) 71 N. J. Eq. 61, 63 Atl. 546; *Claflin* v. *Hamlin* (N. Y. 1881) 62 How. Pr. 284.

It is now settled beyond controversy that the exercise of this power does not offend the Federal Constitution, especially §§ 1 and 2 of Article 4, guaranteeing full faith and credit in each state to the judicial proceedings of the several states and equality of privileges and immunities for their citizens. *Cole* v. *Cunningham* (1890) 133 U. S. 107, 10 Sup. Ct. 269.

[2] See cases *supra*, footnote 1.

In fact, however, the court in *Wilson* v. *Joseph* (1886) 107 Ind. 490, 491, 8 N. E. 616, seems correct in saying that the "subject matter . . . is . . . ultimately but indirectly affected." For if, in some manner, the enjoined suit were prosecuted to judgment, the plaintiff therein would not only be liable for contempt, but it is submitted that where equitable defenses are permitted, the injunction would be a defense to a subsequent action on the judgment. *Dobson* v. *Pearce* (1854) 12 N. Y. 156; see (1915) 15 COLUMBIA LAW REV. 228, 247 *et seq.*

[3] "Not only comity but public policy . . . requires courts should refrain from exercising their powers under such circumstances that they may be brought into collision with each other, and the rights of suitors lost sight of in a useless struggle." See *Harrington* v. *Libby* (N. Y. 1875) 6 Daly 259, 264.

[4] *Royal League* v. *Kavanagh* (1908) 233 Ill. 175, 84 N. E. 178.

If the controversy can be fairly and justly settled by a suit in the courts of a sister state, a court of the domiciliary state will not interfere to prevent the foreign suit.[5] And the fact that the petitioner prefers to have the matter determined by the courts of his domicile is no ground for interference.[6] Nor will the fact that it will be inconvenient for him to go to the other state to defend be sufficient ground in itself to warrant an injunction.[7] Nor does the fact that the rules of evidence in the petitioner's domicile are more favorable to him than are the rules in the sister state, afford reason for injunctive action.[8]

It is not necessary, however, in order to obtain relief to establish fraud, misrepresentation, accident or mistake; it is sufficient merely to show that the purpose or necessary effect of the foreign action is to gain for the plaintiff therein an unconscionable advantage,[9] or to cause the defendant undue hardship.[10] Injunctive relief is also generally granted where the only purpose of prosecuting in a foreign state is to evade the effect of the domiciliary substantive laws.[11] For example: where the purpose is to secure property exempt by the laws of the domicile of the parties;[12] where a resident creditor proceeds against the property of an insolvent debtor in the court of a sister state, thereby interfering with bankruptcy proceedings in the domiciliary state;[13] where a receiver has been appointed and the purpose is to collect moneys or other assets to which, in the domiciliary state, he is entitled;[14] where the intent is to avoid the bar of the domiciliary Statute of Limitations;[15] where it is sought, for the purposes of the trial, to escape the effect of agreements valid only in the domiciliary state.[16]

The decisions frequently overlook the fact that in the above circumstances the substantive rights of the parties would, according to well-recognized principles of the conflict of laws, be settled in other states by the rule laid down by the law of the place where the transaction took place, unless such rule be opposed to the public policy of the forum.[17] It should be noted, however, that

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[5] *Wyeth Hardware, etc. Co. v. Lang* (1893) 54 Mo. App. 147, *aff'd* (1894) 127 Mo. 242, 29 S. W. 1010.

[6] *Cf. Bellows Falls Bank* v. *Rutland, etc. R. R.* (1856) 28 Vt. 470.

[7] *Edgell* v. *Clark* (1897) 19 App. Div. 199, 45 N. Y. Supp. 979.

[8] *Ibid.;* see *Reed's Adm'x* v. *Illinois Cent. R. R., supra,* footnote 1, p. 799; *Wabash Ry.* v. *Peterson, supra,* footnote 1, p. 526.

As pointed out *infra,* footnote 11, a difference in the substantive law is ground for an injunction. But obviously the courts vary almost necessarily in matters of procedure. Therefore, if the foreign courts are to be allowed to try any case of this class, a variance in the procedure must be deemed immaterial.

[9] *Miller* v. *Gittings* (1897) 85 Md. 601, 37 Atl. 372; *Claflin* v. *Hamlin, supra,* footnote 1.

[10] See cases *infra,* footnote 19.

[11] "Equity will enjoin suits in other states where there is fraud, oppression, vexation, injustice, or unconscientious advantage; and most especially where there is an attempt to evade or defeat the operation of the laws of the state where both parties to the suit reside." *Miller* v. *Gittings, supra,* footnote 9, p. 623.

[12] *Wilson* v. *Joseph, supra,* footnote 2; *Snook* v. *Snetzer* (1874) 25 Ohio St. 516; *Griggs* v. *Doctor* (1895) 89 Wis. 161, 61 N. W. 761.

[13] *Cole* v. *Cunningham, supra,* footnote 1; *Cunningham* v. *Butler* (1886) 142 Mass. 47, 6 N. E. 782; *Hawkins* v. *Ireland* (1896) 64 Minn. 339, 67 N. W. 73.

[14] *Vermont R. R.* v. *Vermont Cent. R. R.* (1873) 46 Vt. 792.

[15] *Culp* v. *Butler, supra,* footnote 1; *contra, Thorndike* v. *Thorndike* (1892) 142 Ill. 450, 32 N. E. 510.

[16] *Dinsmore* v. *Neresheimer* (N. Y. 1884) 32 Hun. 204.

[17] *Northern Pac. R. R.* v. *Babcock* (1894) 154 U. S. 190, 14 Sup. Ct. 978; *Louisville & Nashville R. R.* v. *Smith* (1909) 135 Ky. 462, 122 S. W. 806; see (1919) 28 Yale Law Journ. 503.

Holmes, *J.,* in *Walsh* v. *New York, N. H. & H. R. R.* (1894) 160 Mass. 571, 572, 36 N. E. 584: " . . . as between the states of this Union, when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by the law

though the courts so declare the law, nevertheless where the right to be adjudicated is not controlled by statute, forums will often apply to it the principles of the common law as they themselves have interpreted and expounded it, without examining into the decisions of the courts of the original state.[18]

If the suit in the foreign state be "vexatious," it is fairly well established that such suit will be enjoined.[19] In determining whether the action is "vexatious," the courts generally look at the consequences of the threatened action rather than require a specific intent to harass and annoy the defendant.[20] The courts now[21] realize both that the requirements of interstate comity should not be allowed to interfere with the just settlement of controversies, and that the courts have the actual power to control activities of their citizens beyond the limits of their territorial jurisdiction. The way is therefore paved for the application of the same equitable principles to cases of this class as are applied to any prayer for an injunction.

In a transitory action the plaintiff may bring suit wherever the defendant may be found and served, and where it is sought to enjoin such a suit brought in a state other than the domiciliary state, the court in which an injunction is sought should balance the equities on the facts of each particular case in order to determine how justice may best be served.[22] Thus it should be taken into con-

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which governed the conduct of the parties."

Furthermore, in the instant case, the substantive law would be administered and applied in other courts as it would in the domiciliary state, because the action was brought under the Federal Employers' Liability Act, which insures uniformity of substantive law in every court in which such action is brought. *Central Vt. R. R.* v. *White* (1915) 238 U. S. 507, 35 Sup. Ct. 865.

[18] For example, Alabama has established a rule that one who goes upon a railroad track without stopping, looking, and listening is guilty of contributory negligence, and, therefore, cannot recover damages for an injury caused by the negligence of the railroad company. In an action in a Georgia court on a cause of action arising in Alabama and involving the above point of law, the court will apply to it the principles of the common law as it is accustomed to administer it. Adjudication in the Georgia court would, therefore, deny to an Alabama complainant the benefit of that which is a perfect legal defense in his own state, where the accident occurred. See *Weaver* v. *Alabama Gt. So. R. R.* (1917) 200 Ala. 432, 76 So. 364.

[19] "Relief will only be granted when the facts plainly show that the institution of the suit in the foreign state was for the purpose of securing to the plaintiff some unfair or unconscionable advantage either under law or fact, or that the prosecution would subject the defendant to such great and unnecessary inconvenience and expense as to make it appear that the foreign forum was selected for the purpose of vexatiously harassing the defendant." *Reed's Adm'x* v. *Illinois Cent. R. R., supra,* footnote 1, p. 465; *Mason* v. *Harlow* (1911) 84 Kan. 277, 114 Pac. 218; *Claflin* v. *Hamlin, supra,* footnote 1. *Cf. Field* v. *Holbrook* (N. Y. 1856) 3 Abb. Pr. 377; *Kittle* v. *Kittle* (N. Y. 1878) 8 Daly 72, in which cases foreign suits were enjoined because there were pre-existing domiciliary suits in which complete justice could be done.

[20] *Standard Roller Bearing Co.* v. *Crucible Steel Co., supra,* footnote 1; *Reed's Adm'x* v. *Illinois Cent. R. R., supra,* footnote 1; see *Wabash Ry.* v. *Peterson, supra,* footnote 1, p. 527.

[21] It was at first held that after suits were commenced in one of the states, it was inconsistent with interstate comity that their prosecution should be controlled by the courts of another state, and so an injunction would not issue to restrain a proceeding already pending in the courts of a sister state. *Harris* v. *Pullman* (1876) 84 Ill. 20; *Lockwood* v. *Nye* (Tenn. 1852) 2 Swan. 515; *Mead* v. *Merritt* (N. Y. 1831) 2 Paige 402; *Williams* v. *Ayrault* (N. Y. 1860) 31 Barb. 364.

[22] "If, upon balancing the convenience likely to result to the different parties, it appears that the questions involved can be more conveniently litigated in the foreign court, an injunction will be refused. And if it be made to appear that the matters in controversy can be more expeditiously adjusted and the end of justice better attained in the jurisdiction where the parties then are, proceedings in the

sideration whether the operative facts all occurred in the domiciliary state; whether the parties and witnesses reside there; and whether the law applicable is that of the parties' domicile. If the plaintiff secures no legitimate advantage by bringing the action in the foreign state, it is difficult to see why the state of domicile should permit him to compel the defendant to go to needless trouble and expense to defend himself, despite the fact that the foreign court would actually apply the local law.

The recent case of *Chicago, U. & St. P. Ry.* v. *McGinley* (Wis. 1921) 185 N. W. 218, fully illustrates the difficulties inherent in the subject. A Wisconsin railway corporation was sued in Minnesota by an employee under the Federal Employers' Liability Act for injuries sustained in an accident in Wisconsin. The plaintiff was a resident of Wisconsin. The corporation sought an injunction restraining the further prosecution of the Minnesota action. It alleged, *inter alia*, (1) that all the material witnesses resided in Wisconsin, and could not, therefore, be compelled to testify in person before the Minnesota jury; (2) that since the action was brought in a county five hundred miles from the scene of the accident, the petitioner was caused unnecessary inconvenience and expense; (3) that the petitioner would be prejudiced if the trial were permitted to be held in Minnesota because a unanimous verdict of twelve jurors is required in Wisconsin, while ten concurring jurors may render a verdict in Minnesota; (4) that the petitioner would be deprived of the privilege of having the jury view the premises; and (5) that the suit was procured by "ambulance chasing." The complaint was dismissed, because there was no evidence of hardship, oppression or fraud.

It seems harsh and unnecessary, in the instant case, either to compel the petitioner to give testimony by depositions, when bringing suit in a place where it can be brought without detriment to the plaintiff will obviate the need of defending by that method;[23] or else to compel him to pay for bringing witnesses five hundred miles, which is a direct pecuniary injury.[24] No one, however, has a vested interest in the form of procedure, and, therefore, an injunction should not issue simply because in one state there may be a verdict without the concurrence of all the jurors.[25] Similarly, it is assumed that both parties would be given as fair a trial in one court as in the other;[26] but it should be noted that the petitioner is actually deprived of the use of real evidence. The manner in which the attorney secured the case and the fact that the suit was brought at a great distance are, in the absence of other explaining evidence, significant, though not controlling, factors in determining whether or not the suit was "vexatious."[27] In view of the facts of the instant case, the foreign suit seems purposely vexatious, causing the defendant therein undue and unnecessary hardship, not only without the accrual of any legitimate benefit to the plaintiff, but also at the expense of

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courts of the foreign country will be enjoined." High, *Injunctions* (4th ed. 1905) § 105.

[23] Some jurisdictions hold that in an action *quia timet* the petitioner is often amply protected by perpetuating his evidence under statute. *Allerton* v. *Belden* (1872) 49 N. Y. 373. It is clear, however, that testimony by deposition renders it impossible for the jury to judge of the credibility of the witnesses. It needs no argument to show that under certain circumstances this may severely prejudice the petitioner.

[24] In *Wabash Ry.* v. *Peterson, supra,* footnote 1, the court says, p. 526, "[such an injury is] an irreparable one, because the outlays for the purpose are largely non-taxable, and they could not be recovered for, no matter how rich is the party who makes such outlay necessary."

[25] See *supra,* footnote 8.

[26] See *Reed's Adm'x* v. *Illinois Cent. R. R., supra,* footnote 1, p. 799.

[27] See *ibid.* pp. 798, 799.

actually hampering the administration of justice.[28] The decision, therefore, can scarcely be justified.

[28] A foreign suit, however, was not enjoined where it appeared that the plaintiff therein intended to become a resident of the foreign jurisdiction, being desirous of residing there, among other reasons, in order to obtain medical treatments. *Pennsylvania Coal Co.* v. *Hurney* (1916) 252 Pa. St. 564, 97 Atl. 736. Such facts purged the suit of any inequitable characteristics and serve to illustrate a proper case for the prosecution of the suit in the foreign state; indeed, it would have been inequitable to have required that the suit should be brought elsewhere. *Cf. Folkes* v. *Central, etc. Ry.* (1918) 202 Ala. 376, 80 So. 458.